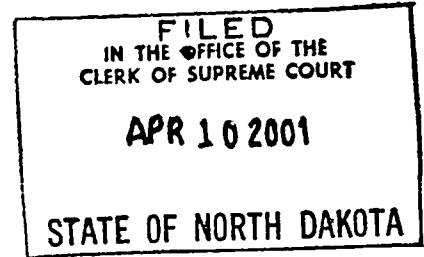


IN THE SUPREME COURT  
STATE OF NORTH DAKOTA  
SUPREME COURT NO. 20010030

Darold B. Shiek, )  
)  
Appellant, )  
)  
v. )  
)  
North Dakota Workers' Compensation )  
Bureau, and North Dakota State )  
University, )  
)  
Appellees. )

20010030



\*\*\*\*\*

**REPLY BRIEF OF APPELLANT DAROLD B. SHIEK**

\*\*\*\*\*

Appeal from Judgment dated November 20, 2000  
Cass County District Court Civil No. CV-00-00604  
The Honorable Michael O. McGuire, Presiding

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## LAW AND ARGUMENT

### I. Summary.

On March 30, 2001, Appellee, Bureau, filed its “Brief of Appellee North Dakota Workers’ Compensation Bureau.” The Bureau has displayed a seemingly utter inability - - and certain unwillingness - - to comprehend the central issue in this case upon remand from this Court in Shiek v. North Dakota Workers Comp. Bureau, 1998 ND 139, 582 N.W.2d 639. The Bureau’s brief is nothing more or less than a rehash of its previous unsuccessful arguments prior to the Supreme Court appeal and decision in Shiek, supra, and ignores the effect of the undisputed finding, upon remand, that Shiek is “permanently and totally disabled.”

### II. **Contrary to the Bureau’s Argument, the Only Relevant Factual Dispute -- Shiek’s Permanent and Total Disability Status -- Has Been Resolved in Shiek’s Favor and Only One Issue -- a Matter of Law and Fully Reviewable by the Court -- Remains.**

The Bureau again misconstrues and misapprehends the stance of this case as it has since the remand from the Supreme Court in Shiek. See Bureau brief at 15-23. The only relevant factual dispute that remained after remand from the Supreme Court in Shiek was the “what’s missing” question of Shiek’s permanent and total disability status. Shiek, ¶ 23; and see Shiek Brief at p. 8. On remand, the Bureau found that Shiek is, in fact, permanently and totally disabled and has been since his alleged retirement date. See discussion at Shiek Brief, p. 5 (citing Finding 21, App. 44-45, and Conclusions of Law 7 and 8, App. 52-53).

Therefore, we now have the undisputed facts that Shiek: (1) intended to voluntarily retire; and, (2) that he became permanently and totally disabled on and before the date that he intended to retire. From these two undisputed facts, the determination of Shiek's entitlement to benefits, as a matter of law, in accordance with the retirement presumption statute arises.<sup>1</sup> It is the only issue<sup>2</sup> before the Court

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<sup>1</sup>Inexplicably, the Bureau devotes the majority of its brief to rehashing matters that are already the "law of the case", e.g., that Shiek intended to voluntarily retire. Bureau Brief at pp. 5-7, 10-12, 17-23. The Bureau continues the argument even through Shiek's testimony at the second formal hearing, after remand ("Shiek's testimony at the second hearing [regarding voluntary retirement] was equally unpersuasive and lacking credibility, whether purposeful or not"). Bureau Brief at 21. The Bureau has burdened the Court with this argument despite Shiek's own counsel conceding at the outset of the formal hearing that Shiek had voluntarily intended to retire ("Also, we emphasize that the Supreme Court ruled that a preponderance of the evidence showed my client intended to retire. That's a [sic] law of the case." Abstract of Record, 386 (Transcript of Proceedings, p. 11, lines 17-19)). Shiek conceded this obvious established fact adding, "If that were the only burden that the Bureau was required to meet, however, there would have been no reason for the Supreme Court to remand the case in Shiek." Abstract of Record, 531 (Shiek's Post-Hearing Brief)..

<sup>2</sup>The Bureau has asserted that, ". . . Shiek attempts to raise a due process argument and an argument regarding disability benefits for the period September 21, 1992 through September 25, 1992. These issues may not properly be raised for the first time in this appeal." Bureau brief at 23, n. 6. The fact that Shiek has never been paid disability benefits for the September 21-25 time frame is not in dispute and the due process considerations of the untimely notice have been consistently argued within the purview of the main issue in this case throughout. See, e.g., "Reply Brief of Appellant Darold B. Shiek" served and filed with the Supreme Court on January 30, 1998 at p. 5, n. 3, as follows:

"The last payment of disability benefits to Shiek was on September 3, 1992 when his disability benefits were terminated. CR 13. The date of the notice informing him of his termination of

(continued...)

and one that is fully reviewable on appeal. See Shiek Brief at p. 8.

**III. The Bureau has not – and cannot – rebut the “absurd and ludicrous” results of the Bureau’s argument that a “permanently and totally disabled” worker can be deprived of benefits because he previously had a subjective intention to “voluntarily retire.”**

Nowhere in the Bureau’s response brief does it even attempt to rebut – because it cannot – the “absurd and ludicrous results” that would be occasioned by the “tortuous construction of the statute” urged by the Bureau. Cf., Shiek, 582 N.W.2d, at ¶ 17. Shiek devoted a considerable portion of his brief (Shiek Brief at pp. 16-19) – via argument and use of hypotheticals – to illustrate the “absurd and ludicrous” results that would be afforded by the Bureau’s “tortuous construction” of the retirement presumption statute. In short, the Bureau has ignored the common sense

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<sup>2</sup>(...continued)

disability benefits is April 26, 1993, [id.] i.e., over seven months after the benefits were terminated. It is questionable whether such notice complies with Shiek’s due process rights. See Flink v. North Dakota Workers Comp. Bureau, 1998 ND 11, [¶] ¶ 15, 16 [574 N.W.2d 784]; citing Beckler v. North Dakota Workers Comp. Bureau, 418 N.W.2d 770, 775 (N.D. 1988). Id., ¶ 15.” Emphasis in original.

The fact that this specific subissue is not noted in the Specifications of Error is not automatically fatal, as the Bureau asserts. In Aalund v. North Dakota Workers Comp. Bureau, 2001 ND 32, ¶ 12, 622 N.W.2d 210, this Court indicated that matters “postured . . . in terms of a constitutional issue” may, under certain circumstances, be raised for the first time on appeal of an administrative agency decision. At any rate, because Shiek has established that he is “permanently and totally disabled”, as argued throughout the proceedings on remand and as agreed by the Bureau in its subsequent final administrative order, he is entitled to permanent total disability benefits as a matter of law, and the Supreme Court need not reach this subissue.

construction of the statute that an injured worker's subjective intention to "voluntarily retire" does not mean that the injured worker is not entitled to disability benefits if he proves that he became "permanently and totally disabled" on or before the date that he previously – and subjectively – intended to retire. Shiek Brief, id. Shiek will not repeat that argument here but – rather – offers that the Bureau, by ignoring the argument, has tacitly admitted that there is no reasoned argument to the contrary.

### CONCLUSION

Shiek, on remand from the Supreme Court, has proven that he is "permanently and totally disabled" and, accordingly, he was totally, permanently, and unconditionally unable to work, thus precluding any finding or conclusion that he ". . . retired from the labor market voluntarily rather than having been forced from that market by the disability." Shiek, ¶ 21. The Bureau's response brief offers absolutely no cogent argument to the contrary. Indeed, this common sense conclusion -- based on undisputed facts and flowing from an interpretation of the statute that avoids forfeiture and affords relief -- has been ignored by the Bureau.

Therefore, the Judgment of the District Court affirming the Bureau's "Final Order" of January 27, 2000 must be reversed and this matter remanded to the Bureau for the purpose of the Bureau calculating and paying permanent total disability benefits to Shiek from the onset of his permanent and total disability status on Monday, September 21, 1992, through the present time and ongoing.

Respectfully submitted this 10<sup>th</sup> day of April 2001.

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